United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1315 B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Appellee, - against - RANDY WILLIAM BROWN, Defendant-Appellant.	DOCKET NO. 75-1315

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Eastern District of New York, Mishler, J., dated July 1, 1975, granting the motion of the District Attorney of Suffolk County, New York, for an order remanding this action to the County Court, County of Suffolk.

The defendant-appellant, Randy William Brown, was indicted by a Suffolk County Grand Jury on May 20, 1974, for the crimes of assault in the second degree [N.Y.S. Penal Law §120.05, subd. 3], obstructing governmental administration [N.Y.S. Penal Law §195.05] and resisting arrest [N.Y.S. Penal Law §205.30]. On February 4, 1975 he filed a petition for removal in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. §1443. Thereafter, on April 29, 1975, the District Attorney of Suffolk County moved to remand the action to the County Court of Suffolk County, State of New York.

STATEMENT OF THE FACTS

The defendant-appellant, Randy William Brown, in his petition for removal alleged that he was unable to receive a fair trial in the County of Suffolk "because the courts and the government officers charged with the enforcement of the Penal Law of the State of New York in that County [are prejudiced] against persons charged with assaults on police officers who complain of being abused by police". The specific act of prejudice concerned the Suffolk County Court's denial of discovery, inter alia, of personnel files and other information concerning the police officer alleged to have abused appellant. The order denying discovery held these items to be exempt property as defined in New York State Criminal Procedure Law §240.10, subd. 3. Defendant-appellant here claims that the conduct of the police officer was racially motivated and that the court's decision to exclude the officer's personnel file violated appellant's rights under 18 U.S.C. §242 and 42 U.S.C. §1981.

I

THIS STATE CRIMINAL PROSECUTION IS NOT REMOVABLE UNDER 28 U.S.C. SECTION 1443 SINCE THE DEFENDANT-APPELLANT'S CLAIM THAT HE CANNOT RECEIVE A FAIR TRIAL IN THE NEW YORK COURTS IS NOT A RIGHT UNDER ANY LAW PROVIDING FOR THE EQUAL CIVIL RIGHTS OF CITIZENS OF THE UNITED STATES.

The defendant-appellant, Randy William Brown, alleges, by his attorney, that he cannot enforce his rights under the New York State Penal Law because the courts and police in Suffolk County have such prejudice against people "who complain of being abused by police" that it would be impossible for him to receive a fair trial [Appendix to Appellant's Brief at 12*, Petition For Removal, pars. 5 and 6].

"It is essential for removal under 28 U.S.C. §1443, subd. 1, that the prosecution be '[a]gainst any person who is denied or cannot enforce [one of his civil rights] in the courts of such State' and that the right must be one arising 'under any law providing for the equal civil rights of citizens of the United States'" [Chestnut v. People of the State of New York, 370 F.2d 1 at 3 (2d Cir., 1967)]. Defendant-appellant Brown's contention that he has been denied due process because he cannot get a fair trial in the New York courts does

* (Pagination, unless otherwise indicated, refers to Appendix To Appellant's Brief.)

not meet the requirements for removal under this subdivision.

The requirements for removal of a criminal proceeding pursuant to 28 U.S.C. §1443 were set forth by the Supreme Court in State of Georgia v. Rachel [384 U.S. 780 (1966)] and its companion case City of Greenwood, Mississippi v. Peacock [384 U.S. 808 (1966)]. The Court in Rachel stated that the phrase "any law providing for....equal civil rights" must be construed to mean:

> "any law providing for specific civil rights stated in terms of racial equality. Thus, the defendant's broad contentions under the....Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under sec. 1443, because the guarantees of these clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that sec. 1443 demands."
>
> [Georgia v. Rachel, supra, at 792].

It is interesting to note that this Court of Appeals had construed subdivision one of the statute in precisely the same manner more than eighteen months prior to the Rachel case in People of the State of New York v. Galamison [342 F.2d 224 (2d Cir., 1965); See also People of the State of New York v. Gardner, ____ F.Supp.

____, 73 CR 231 (dec. by Judd, J., dated October 4, 1974)]. The defendant-appellant alleges that such requirement is met by the assertion that the police conduct was racially motivated in contravention of his rights under 42 U.S.C. §1981, a statute which has been held to be stated in terms of equal civil rights [City of Greenwood, Mississippi v. Peacock, supra]. However, as the court below explained "the specific right which defendant is seeking to enforce on removal is his right to a fair trial" [Appendix at 7]. The mere fact that a defendant has had "[b]ad experiences with one particular court in question", will not be sufficient for removal [People of the State of California v. Sandoval, 434 F.2d 635 (9th Cir., 1970)].

The petition for removal here alleges merely that the defendant-appellant cannot receive a fair trial in the state court. However, the Supreme Court has explained that the contents of the petition should allege:

> "....not merely that rights of equality would be denied or could not be enforced, but that the denial would take place in the Courts of the State. The doctrine also required that the denial be manifest in a formal expression of state law. This requirement served two ends. It ensured that removal would be available only in cases where the predicted denial appeared with

> relative clarity prior to trial. It also ensured that the task of prediction would not involve a detailed analysis by a federal judge of the likely disposition of particular federal claims by particular State Courts. That task not only would have been difficult but it also would have involved federal judges in the unseemly process of prejudging their brethren of the state courts."
>
> [Georgia v. Rachel, supra, at 803-4, emphasis supplied]

Nowhere does the petition allege, nor could defendant-appellant ever substantiate that the denial of a fair trial is a formal expression of New York State law. Further, as the court below concluded on this question:

> "....the alleged impossibility of receiving a fair trial....may be grounded in racial prejudice, but, nevertheless, the denial of that right [to a fair trial] will not support removal."
>
> [Appendix at 6]

Secondly, the defendant-appellant argues that the Suffolk County Court's interpretation of exempt property under New York Criminal Procedure Law §240.20, subd. 3 is the requisite "law of general application" that denies him a specified federal right in the state courts [Georgia v. Rachel, supra, at 800] so as to permit removal. Specifically, it is alleged that since the law prohibits defendant-appellant from discovery of the arresting officer's personnel file, he is being denied the right to a fair trial. However, as indicated by the court below:

> "....these sections of the CPL do not operate to deprive defendant of any of his civil rights, be they stated in terms of racial equality or otherwise. The provisions simply set out the parameters of discoverable material in a criminal proceeding in New York."
>
> [Appendix at 8]

It appears that defendant-appellant's position is most similar to that presented in the Peacock case. There, the petitioners argued that removal was necessary because they were being prosecuted in state court solely because of their race and were, therefore, unable to obtain a fair trial in such court [City of Greenwood, Mississippi v. Peacock, supra, at 826]. The Supreme Court commented upon this argument as follows:

> "It is not enough to support removal [under §1443, subd. 1] to allege or show that the defendant's federal equal rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be 'denied or cannot enforce in the courts' of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the

> judges of the federal courts to put their brethren of the state judiciary on trial. Under §1443 [1], the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."
>
> [at 827-8, emphasis added]

Finally, courts have held that removal petitions alleging facts under the various amendments to the United States Constitution do not warrant removal because these provisions are of a broad constitutional nature and are not laws providing for the equal civil rights of citizens. Defendant-appellant's claim of a failure to receive a fair trial is of a broad constitutional nature and is not a denial under a specific equal civil rights law [Varney v. State of Georgia, 446 F.2d 1368 (5th Cir., 1971); State of Georgia v. Spencer, 441 F.2d 397 (5th Cir., 1971); People of State of California v. Sandoval, supra; Trigg v. Moseley, 433 F.2d 364 (10th Cir., 1970); Naugle v. State of Oklahoma, 429 F.2d 1268 (10th Cir., 1970)].

II

ASSUMING, ARGUENDO, THAT THE ALLEGATIONS IN THE PETITION FOR REMOVAL ARE TRUE IN THAT THE DEFENDANT-APPELLANT CANNOT RECEIVE A FAIR TRIAL IN THE STATE COURTS, A HEARING ON THE MOTION TO REMAND IS NOT REQUIRED, SINCE THIS IS NOT A RIGHT UNDER ANY LAW PROVIDING FOR THE EQUAL CIVIL RIGHTS OF CITIZENS.

It is clearly established in the preceeding argument that the allegation of a failure to obtain a fair trial in the state court is not a right under any law providing for the equal civil rights of citizens. Further, even were defendant-appellant to sufficiently establish this fact, he still does not come within the removal provisions of 28 U.S.C. §1443.

In Peacock v. City of Greenwood [347 F.2d 679 (1965)], the Court of Appeals for the Fifth Circuit ordered a hearing on the truth of the defendant's allegations, holding that a good claim for removal was stated in the petition. However, the Supreme Court reversed [384 U.S. 808], holding that 28 U.S.C. §1443 does not justify removal of the criminal prosecutions to a federal court. On its face, the complaint did not allege a denial of a right under any law providing for "equal civil rights" and a hearing was not required [compare: Georgia v. Rachel, 384 U.S. 780 at 805, where the court held that if the defendants established that they were

ordered to leave the restaurant facilities solely for racial reasons and that the facilities were establishments covered by the Civil Rights Act, the defendants were entitled to remove the prosecution under 28 U.S.C. §1443, subd. 1].

"Where the allegations of the petition for removal, taken as true, do not support removal, there is no right to a hearing for factual development" [State of Georgia v. Spencer, 441 F.2d 397 at 398 (5th Cir., 1971); Varney v. State of Georgia, 446 F.2d 1368 at 1369 (5th Cir., 1971); People of the State of New York v. Gardner, ____ F.Supp. ____, 73 CR 231 (1974)].

CONCLUSION

FOR THE ABOVE STATED REASONS THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED AND THE MATTER BE REMANDED TO THE COUNTY COURT, SUFFOLK COUNTY.

DATED: Riverhead, New York
October 28, 1975

Respectfully submitted,

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ADDENDUM

New York Criminal Procedure Law Section 240.20, subd. 3

"Upon motion of a defendant against whom an indictment is pending, the court, under circumstances prescribed in this section, must or may issue an order of discovery:

****

3. Subject to the provisions of subdivisions four and five, such discovery may be ordered with respect to any other property specifically designated by the defendant, except exempt property, which is within the possession, custody or control of the district attorney upon a showing by the defendant that (a) discovery with respect to such property is material to the preparation of his defense, and (b) the request is reasonable."

New York State Public Officers Law, Article 6 - Freedom of Information Law, Section 88

"1. Each agency, in accordance with its published rules, shall make available for public inspection and copying:

a. final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

b. those statements of policy and interpretations which have been adopted by the agency and any documents, memoranda, data or other materials constituting statistical or factual tabulations which led to the formulation thereof;

c. minutes of meetings of the governing body, if any, of the agency and of public hearings held by the agency;

d. internal or external audits and statistical or factual tabulations made by or for the agency;

e. administrative staff manuals and instruction to staff that affect members of the public;

f. police blotters and booking records;

g. an itemized record setting forth name, address, title, and salary of every officer or employee of an agency except officers and employees of the state law enforcement agencies shall be compiled by each fiscal officer charged with the duty of preparing payrolls to bona fide members of the news media upon written notice. In the case of the state police or employees' titles and salary only, without identifying individual employees. Said written notice shall be made upon a form to be prescribed by the comptroller of the state and shall be reasonable and specify what records are to be requested with particularity. The records may be inspected under the supervision of the particular fiscal officers' office and only in the particular fiscal officers' office during regular working hours and regular working days or at such other place as may be convenient to the particular fiscal officers; and

(h) final determinations and dissenting opinions of members of the governing body, if any, of the agency; and

i. any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying.

2. Each agency shall make and publish rules and regulations in conformity with this article, pursuant to such general rules as may be issued by the committee on public access to records, pertaining to the availability, location and nature of such records, including, but not limited to:

a. The times and places such records are available;

b. The persons from whom such records may be obtained;

c. The fees, to the extent authorized by this article or other statute, for copies of such information; and

d. The procedures to be followed.

The governing body of a municipality may make and publish uniform rules for any group of or all agencies in that municipality.

3. To prevent an unwarranted invasion of personal privacy, the committee on public access to records may promulgate guidelines for the deletion of identifying details for specified records which are to be made available. In the absence of such guidelines, an agency or municipality may delete identifying details when it makes records available. An unwarranted invasion of personal privacy includes, but shall not be limited to:

a. Disclosure of such personal matters as may have been reported in confidence to an agency or municipality and which are not relevant or essential to the ordinary work of the agency or municipality;

b. Disclosure of employment, medical or credit histories or personal references of applicants for employment, except such records may be disclosed when the applicant has provided a written release permitting such disclosure;

c. Disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility;

d. The sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fund-raising purposes;

e. Disclosure of items of a personal nature when disclosure would result in economic or personal hardship to the subject party and such records are not relevant or essential to the ordinary work of the agency or municipality.

4. Each agency or municipality shall maintain and make available for public inspection and copying, in conformity with such regulations as may be issued by the committee on public access to records, a current list, reasonably detailed, by subject matter of any records which shall be produced, filed, or first kept or promulgated after the effective date of this article. Such list may also provide identifying information as to any records in the possession of the agency or municipality on or before the effective date of this article.

5. In addition to the requirements imposed by subdivision one of this section each agency or municipality controlled by a board, commission or other group having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding in which he votes.

6. Each agency or municipality on request for identifiable records made in accordance with the published rules, shall make the records promptly available to any persons, and, upon payment of, or offer to pay, the fees allowed by law or rule, either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search for such records, or certify that a record, of which that agency is legal custodian, cannot be found.

7. Notwithstanding the provisions of subdivision one of this section, this article shall not apply to information that is:

a. specifically exempted by statute;

b. confidentially disclosed to an agency and compiled and maintained for the regulation of commercial enterprise, including trade secrets, or for the grant or review of a license to do business and if openly disclosed would permit an unfair advantage to competitors of the subject enterprise, but this exemption shall not apply to records the disclosure or publication of which is directed by other statute ; or

c. if disclosed, an unwarranted invasion of personal privacy, pursuant to the standards of subdivision three of this section.

d. part of investigatory files compiled for law enforcement purposes.

8. Any party denied access to a record or records of an agency or municipality may appeal such denial to the head or heads, or an authorized representative, or of the agency or municipality. If that person further denies such access, his reasons therefore shall be explained fully in writing within seven business days of the time of such appeal. Such denial shall be subject to review in the manner provided in article seventy-eight of the civil practice law and rules.

9. a. A committee on public access to records is hereby created, to consist of the commissioner of the office of general services or his delegate whose office shall act as secretariat for the committee, the director of the division of the budget or his delegate, the commissioner of the office for local government or his delegate and four other persons who are not

elected or appointed officials or employees of any other agency, appointed by the governor, at least two of whom are or have been representatives of the news media. Of the four other persons first appointed, one shall be appointed for a term of four years, one for a term of three years, one for a term of two years and one for a term of one year. Thereafter their respective successors shall each be appointed for terms of four years. The committee shall meet from time to time to:

i. advise agencies and municipalities regarding this article by means of guidelines, advisory opinions, regulations or other means deemed advisable;

ii. promulgate and issue rules and regulations in conformity with this article in relation to subdivisions two and four of this section; and

iii. recommend changes in the freedom of information law in order to further the purposes of this article.

b. The four persons apointed[1] by the governor shall be entitled to receive reimbursement for actual expenses incurred in the discharge of their duties.

10. Nothing in this article shall be construed to limit or abridge any existing right of access at law or in equity of any party to public records kept by any agency or municipality."

28 U.S.C. Section 1443, subd. 1

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;"

[1] So in original. Probably should be appointed.

42 U.S.C. Section 1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."